

No. 2579.

IN THE

**United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT**

THE CITY OF ASTORIA  
(A municipal corporation)

Plaintiff in error,

vs

AMERICAN LA-FRANCE FIRE ENGINE  
COMPANY, a corporation,  
Defendant in error.

**BRIEF FOR PLAINTIFF IN ERROR**

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Filed this ..... day of April, 1915

Frank D. Monckton, Clerk

By ..... Deputy Clerk.

F. D. Monckton,  
Clerk



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**STATEMENT OF THE CASE**

This is an action instituted by the American-La France Fire Engine Company, a corporation, against the City of Astoria, Oregon, on a contract entered into between the American-La France Fire Engine Company, a corporation, and the Fire and Water Committee of the Common Council of the City of Astoria, for the sum of \$9500.00 the purchase price of a six cylinder combination pump-hose and chemical auto car, to be used as a fire apparatus by the Fire Department of said City in extinguishing fires therein.

On the 21st day of July, 1913, the Committee on Fire and Water presented a communication to the Common Council, in words and figures as follows:

"Astoria, Oregon, July 21st, 1913.

To the Mayor and Council.

Gentlemen:

In connection with the recommendation of the Chief of the Fire Department we would recommend that we be authorized to get prices on another auto fire apparatus and submit them with our recommendations to the next meeting of the Council.

Charles Wilson.

Karl Knobloch.

John Nordstrom.

Committee on Fire and Water."

On the date mentioned in the communication, it was received by the Common Council in regular session and thereupon a verbal motion was made, seconded and carried that the Committee be authorized to secure prices and report the same to the Council, together with its recommendation. Thereafter, on the 4th day of August, 1913, the Common Council of said City met in regular session and at such meeting, the Committee on Fire and Water submitted its report, in words and figures as follows:

"Astoria, Oregon, August 4th, 1913.

To the Mayor and Council,

Gentlemen:

In accordance with the action of last meeting we herewith submit the cost of a piece of auto apparatus.

A combination wagon, single tank, will cost \$5500.00; with double tanks \$5800. A triple combination pump hose and chemical, the size we think proper, will cost \$9500.00 F. O. B. Astoria. We

would therefore recommend that we, by the adoption of this report, be authorized to enter into contract with A. G. Long, Agent of the American-La France Fire Engine Co. for one type 12, six cylinder Combination Pump Hose and Chemical Car for the sum of \$9500.00.

In connection with this report, we would say that it was the intention of the Council last year that another piece of auto apparatus should be bought this year, and the Committee on Ways and Means provided for the same in the levy and the taxes were collected on that basis. We believe it will be a wise investment to purchase this piece of apparatus, as along with the hose and chemical we will have a powerful pump, should the occasion demand it at any time it might pay for itself in a short time.

If we do not purchase at this time it will mean that we will have to levy a large tax again next year, or else not add any to the department's efficiency with apparatus. If we buy now we can cut down the levy for next year a very considerable amount. While it is true that we have expended a large amount for the department in the last few years in buying apparatus, we believe the reduction in insurance will more than off set the same in a short time.

Charles Wilson

John Nordstrom

Karl Knobloch

Committee on Fire and Water."

That said report was duly received by the Common Council and read in open session and thereupon, a verbal motion was made by a member of the Common Council that the said report be adopted by and it was thereupon adopted by the unanimous vote of the Common Council. Two days thereafter, and on the 6th day of

August, 1913, the said Committee on Fire and Water of said Common Council of said Plaintiff in error, entered into a contract in writing, which, omitting the specifications and guarantees attached thereto, was in words and figures as follows, to-wit:

“THIS AGREEMENT, Made by and between the AMERICAN-LA FRANCE FIRE ENGINE COMPANY, Inc. party of the first part, hereinafter called the Company, and CITY OF ASTORIA, OREGON, party of the second part, hereinafter called the Buyer.

WITNESSETH: That the Company agrees to sell upon the conditions which are below written the apparatus and equipment hereinbefore described, all of which are to be in accordance with the specifications and guarantees attached, and which are made a part of this agreement and contract.

Delivery is to be made on cars at Astoria, Oregon, and shipment to be made within about 60 working days after receipt and approval of this contract, duly executed, or as soon thereafter as is consistent with good workmanship and proper painting, subject to delays resulting from any causes beyond the control of the Company.

The Buyer agrees to purchase and pay for the aforesaid property, delivered as aforesaid, the sum of Nine Thousand Five Hundred Dollars (\$9,500.00) to be paid to the American-La France Fire Engine Company or its authorized agent as stated below, with interest at the rate of six per cent per annum upon any sum not so paid from the time such payments become due until same is paid. No payments to be made to agents except on presentation in writing of an express power of attorney to accept payment.

Terms of payment to be:

Nine Thousand Five Hundred Dollars in cash within fifteen days after delivery and acceptance of the apparatus and equipment.

Witness our hands and official seals this 6th day of August, 1913.

AMERICAN-LA FRANCE FIRE ENGINE  
COMPANY, Inc.

Party of the first part

By A. G. Long, Genl Agt.

THE CITY OF ASTORIA

By Charles Wilson, Ch.

K. Knobloch

John Nordstrom

Fire and Water Committee.”

On the same day the contract was executed and filed with the Auditor and Police Judge of said City.

The powers of the Council of the City of Astoria are set out in Section 38 of the Charter, which provides as follows:

Sec. 38: THE COUNCIL HAS POWER AND  
AUTHORITY WITHIN THE CITY OF ASTORIA:

Then follows fifty-seven sub-divisions defining the powers of the Council. Sub-division 42 of the powers being as follows:

TO MAINTAIN A FIRE DEPARTMENT

Par. 42. To make regulations for the prevention of accident by fire; to organize, establish and maintain a fire department, whether paid or volunteer; to appoint three competent persons as fire commissioners, and to make and ordain rules for the government of the fire department; to provide engines and other apparatus for the department.

Section 39 of the Charter of the City of Astoria provides as follows:

#### POWER TO BE EXERCISED BY ORDINANCE

Section 39. The power and authority given to the Council by Section 38 can only be exercised or enforced by ordinance, unless otherwise provided, and a majority of the Council may pass any ordinance or make any by-law not repugnant to the laws of the United States or of this state, necessary or convenient for the carrying such power and authority, or any part thereof into effect, and as may be necessary to secure the peace and good order of the city, and the health of its inhabitants.

Sub-division 33 of Section 38 of the Charter of the City of Astoria, provides as follows:

#### TO CONTRACT DEBTS—OFFICERS NOT TO BE INTERESTED IN CONTRACTS

Par. 33. To appropriate money to pay the debts, liabilities and expenditures of the city, or any part or item thereof, from any fund applicable thereto; PROVIDED, that no bills shall be contracted by any person or officer of the city without first sending to the Common Council a written requisition therefor, stating the items needed with the cost thereof, and, if the Common Council deem the supplies necessary, they shall authorize the proper committee to purchase the same; PROVIDED, that in case of an emergency the Committee on Fire and Water, and Streets and Public Ways, may incur indebtedness not to exceed \$100; PROVIDED FURTHER, that neither the Mayor, nor any member of the Common Council, nor any officer of the City of Astoria, shall either directly or indirectly enter into a contract with the city, nor furnish supplies or provisions to the city. If the Mayor or any member of the Common Council or any officer of the city, shall violate the provisions of the City Charter, his office will be deemed vacant.



Section 124 of the Charter of the City of Astoria provides as follows:

#### CONTRACTS AUTHORIZED BY ORDINANCE

Sec. 124. The City of Astoria is not bound by any contract or in any way liable thereon, unless the same is authorized by city ordinance, and made in writing, and by order of the Council, signed by the Auditor and Police Judge, or some other person duly authorized, on behalf of the city. But an ordinance may authorize any officer or agent of the city, naming him, to bind the city, without a contract in writing, for the payment of any sum of money not exceeding one hundred dollars.

Section 44 of the Charter of the City of Astoria provides as follows:

#### Approval of Ordinance.

Sec. 44. Upon the passage of any ordinance, the enrolled copy thereof attested by the Auditor and Police Judge, shall be submitted to the Mayor by the Auditor and Police Judge, and if the Mayor approve the same, he shall write upon it "approved" with the date thereof, and sign it with his name of office, and thereupon, unless otherwise provided therein, such ordinance shall become law and of force and effect.

Section 45 of the Charter of the City of Astoria provides as follows:

#### POWER TO VETO ORDINANCE

Sec. 45. If the Mayor does not approve an ordinance so submitted, he must, within ten days from the receipt thereof, return the same to the Auditor and Police Judge with his reasons for not approving it; and if the Mayor do not so return it such ordinance shall become law as if he had approved it.

Section 46 of the Charter of the City of Astoria provides as follows:

#### PASSAGE OVER VETO

Sec. 46. Upon the first meeting of the Council after the return of an ordinance from the Mayor, not approved, the Auditor and Police Judge shall deliver the same to the Council with the message of the Mayor, which must be read, and such ordinance shall then be put upon its passage again, and then, if two-thirds of all members constituting the Council, as then provided by law, vote in the affirmative, it shall become a law without the approval of the Mayor, and not otherwise.

The question presented upon this writ of error is whether the Fire and Water Committee of said Common Council had the power and authority to create such an indebtedness and enter into such a contract as it did on the part of the City of Astoria and in its behalf, without an Ordinance passed in due form and order, authorizing it so to do.

The lower Court sustained the authority of the Fire **and** Water Committee, maintaining its authority to enter into such contract and from this decision the City of Astoria prosecutes this writ of error, and the matter is now before your Honors for final decision and determination.

ASSIGNMENT OF ERRORS  
 IN THE DISTRICT COURT OR THE UNITED  
 STATES FOR THE DISTRICT OF OREGON

Suit at Law No. 6406.

AMERICAN-LA FRANCE FIRE  
 ENGINE COMPANY, a corporation,  
 Plaintiff

vs

THE CITY OF ASTORIA, a municipal  
 corporation of the State of Oregon.  
 Defendant.

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Now comes the said defendant, the City of Astoria, a municipal corporation, and in connection with its petition for a writ of error in the above entitled action, says that there was error on the part of the District Court of the United States for the District of Oregon in regard to the matters and things hereinafter set forth, and therefore, the defendant makes this its

ASSIGNMENT OF ERRORS

I.

That the said District Court erred in allowing the motion made by the plaintiff, for a judgement on the pleadings.

II

That the said District Court erred in holding that the answer of the defendant, filed in said cause, did not present any issue of fact to be tried.

III

That the said District Court erred in allowing said mo-

tion for judgment on the pleadings and giving a judgment against said defendant.

## IV.

That the said Court erred in not sustaining the defendant's demurrer interposed in said cause.

## V.

That the said District Court erred in not dismissing said action.

## VI.

That the said District Court erred in rendering judgment in favor of the plaintiff and against the defendant, for the reason that the same is contrary to the law.

WHEREFORE, the said defendant, plaintiff in error, prays that the judgment of the District Court of the United States for the District of Oregon, in the above entitled cause, be reversed and that the said action may be dismissed.

A. W. NORBLAD,  
Attorney for defendant.

## ARGUMENT

This question must be viewed from many different angles, and the invalidity of the contract results from the fact that:

1.—The power to make a contract is a legislative power and cannot be delegated.

2.—Legislative power conferred by the charter of a city must, in the absence of an express exception, be exercised by ordinance.

3.—The charter prescribes the mode and manner of executing contracts, prescribing certain formalities of execution, after proper authorization by ordinance; and these formalities being mandatory, no contract is binding unless they are observed.

4.—The Fire and Water Committee had no power to contract and had no authority to sign a contract on behalf of the city.

**(1) The power to make a contract is a legislative power and cannot be delegated.**

It will be conceded that the mode of contracting prescribed by the City's Charter is the measure of the City's power to contract. The Charter is a grant of power and the municipality possesses only the powers which its charters confers upon it, either expressly or as incidental to the execution of its powers.

City of Corvallis vs Carlili, 10 Or. 139.

Mut. Ins. Co. vs Baker City, 58 Or. 315.

A municipal corporation possesses and exercises the following powers, and no others: First, those granted in express words; second, those necessarily of fairly implied in and incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient but indispensable.

Farwell vs City of Seattle, 43 Wash. 141.

So. Pasadena vs Pasadena Co. 152 Cal. 602.

The powers of a municipal corporation are either legislative or administrative. Between these there is a vast difference, which the courts have consistently recognized in dealing with either municipalities or with public officers. The distinction presents itself most strongly in the present case. It meets us fairly and squarely at the threshold of this litigation; for upon the character of this action of the council herein, whether same was legislative or ministerial—depends the entire structure of the opposition. Whether the power exercised by the Committee on Fire and Water in entering into this contract, being in its nature a legislative act, could not as such be delegated.

Let us first enquire into what is meant by legislative powers, and by ministerial or executive powers.

**Legislative Power** is that through which the municipality creates and defines rights and duties, prescribed rules of conduct and regulates the relations among individuals, and between them and the city.

**Executive Power** is that which is concerned with the enforcement of these laws.

The distinction between Legislative and Executive Power is will and execution. The peculiar functions of the legislative department is to deliberate, to consult upon the various needs of society, and to formulate the will of the municipality in respect to the multitudinous affairs which require to be regulated. The primary function of the executive, on the other hand, is to administer and enforce the will of the City as thus formulated. Executive power is thus used in the sense of ministerial duty, in respect to which nothing is left to discretion. A simple, definite duty, arising under conditions admitted or found to exist, and imposed by law, the performance of which may, in proper case, be required by judicial process. Legislative power, on the other hand, is beyond enforcement by judicial process.

It is a fundamental principle of law that legislative powers cannot be delegated by a corporation unless authority to delegate is especially granted by statute, nor can it divest itself of the discretion vested in it by the authority which created it.

State vs Garibaldi, 44 La. 809.

Exparte Francis, 165 S. W. 172 and authorities cited.

All corporations, of whatever kind, are moulded and controlled, both as to what they may do and the manner in which they may do it, by their charters or acts of incorporation which to them are the laws of their being and which they can neither dispense with nor alter. The Council of a City is an agent of the City with delegated power; and in the absence of statutory authority

to delegate such powers to others it has no right to do so.

*City of Louisville vs Parsons*, 150 S. W. (Ky) 498.

In *Thompson vs Board of Trustees*, 144 Cal. 281, it was declared that the Board could not divest itself for any length of time, of legislative and discretionary power vested in it by the general laws. In view of this principle of law, the question necessarily arises, as to the authority of this council to delegate its powers to a subordinate committee? If the acts delegated are legislative, it certainly did not have any such power.

The charter does not attempt to define what acts are intended to be embraced by the term legislative powers; nor does it define the meaning of the term administrative powers. To determine its classification we must look to the nature or character of the act itself. The distinction between the powers of a municipal corporation to create and its power to execute—and this is virtually what is meant by legislative powers—considered apart from any express or implied provision of the charter, is well recognized. The council acts in a dual capacity—in a public and political character, exercising subordinate legislative powers and in its private character exercising the powers of an individual or private corporation. Legislative powers imply judgment and discretion upon the part of those who exercise them, and a special confidence and trust upon the part of those who confer them.

*Rugles vs Collier*, 43 Mo. 353.

Regard should be had, not so much to the nature and character of the various powers conferred as to the ob-



ject and purpose the legislature had in conferring them. If granted for a public purpose exclusively they belonged to the corporate body and its public, political and municipal character. But if the grant is for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation is regarded as a private company.

City of Seattle vs Stirrat, 55 Wash. 560.

Bailey vs New York, 3 Hill (N. Y.) 531.

There can be no question of the character of the power conferred upon the City of Astoria to establish a fire department for that city. It was of a purely public character, for the comfort and protection of its inhabitants. In *Jones vs Schuylkill L & R Co.* 202 Fed. 164, Legislative acts were declared to be permanent regulations for the government of the borough, granting of privileges to occupy streets, **and the creation of liability by contract**; whilst under ministerial acts were classed the transaction of current business, the ordinary administration of municipal affairs and the **awarding of contracts previously authorized by ordinance.**

See also, *Com. Vs Nat. Bank*, 9 Pa. Super. Ct. 118.

*Earl vs B*, 140 Cal. 754.

*Jersey City vs H*, 71 N.J.L. 69, aff'g 72 N.J.L. 185.

*Staub vs P*, 138 Pa. 539.

*Lansdowne vs Citizen's E. L. & P. Co.*, 206 Pa. 188.

The power, then, to authorize a contract involving liability is clearly a legislative power, and the authority to award a contract to a successful bidder under this

power is clearly the exercise of a ministerial act. This is identically the question involved in this proceeding. The making of a contract for lighting the streets was held in *Los Angeles Gas Co. vs Taberman*, 61 Cal. 199, an exercise of the legislative powers of the council. Authority to make alterations in the specifications for contract, was, also, held a delegation of power conferred by statute (*Gratz vs City* 15 Utah 67); also, exclusive power over street improvements, (*Chase vs City Treas.*, 122 Cal. 540). So, also, in the matter of public improvements, as involving the exercise of discretion and judgment. *City Mut. Ins. Co. vs Baker City*, 58 Or. 306; *Neill vs Gales*, 152 Mo. 594, and *Galendo vs Walter* 8 Cal. App. 234 presents the question involved in this case. There the power to establish sewers, and to provide plans and means for their construction, had been granted the City, as the power to establish a fire department and provide for its equipment in the present case, and it was held that the city could not delegate this power, being legislative, and implying judgment and discretion, to any person or persons.

Under the city charter of St. Louis the council was empowered to put in sewers of such dimensions as might be prescribed by ordinance. Pursuant to this authorization, an ordinance was passed providing for the construction of a sewer of such dimensions and of such materials as might be deemed requisite by the City Engineer; and it was held that the council could not delegate a duty thus plainly and expressly devolved upon them to the mere discretion and caprice of an individual.

*St. Louis vs Clemens*, 43 N. W. 395.

Under the decisions, the council of Astoria has evidently clearly transcended its authority in delegating a power which only itself had the authority to exercise.

**(2)—Legislative power conferred by the charter of a City must, in the absence of an express exception, be exercised by Ordinance.**

If, therefore, the council is without authority to delegate its legislative powers, then the council itself is only authorized to exercise its powers, in the absence of express exception, by ordinance; and only in the manner and under the forms prescribed by the charter. A city speaks through its ordinances, passed and promulgated under the authority which created it.

Tharp vs Blake, 171 S. W. 549.

It is its only medium of expression. The charter requires and points out this medium; and when a contract is made through any other source it has no binding force.

Los Angeles Gas Co. vs Toberman, *supra*.

City of Bryan vs Page, 51 Texas 532.

Moore vs Mayor, 73 N. Y. 238.

Jones vs City of Caruthersville, 171 S. W. 660.

Let us see how far this council complied with the requirements of its charter. A brief reference to the powers and limitations imposed on the City of Astoria in this matter is therefore necessary to determine the extent of its liability and the measure of its duty in the premises.

**Sec. 38** of the charter of the City of Astoria reads as follows:

“The council has power and authority within the City of Astoria (among other things) to maintain a fire department.

**Par. 42**—To make regulations for the prevention of accidents by fire; to organize, establish and maintain a fire department, either paid or volunteer; to appoint three competent persons as fire commissioners, and to make and ordain rules for the government of the fire department; to provide engines and other apparatus for the department.

**Sec. 39**—The power and authority given to the council by Sec. 38 **can only be exercised or enforced by ordinance**, unless otherwise provided; and a majority of the council may make any by-law not repugnant to the laws of the United States or of this State, necessary or convenient for the carrying such power and authority or any part thereof into effect, and as may be necessary to secure the peace and good order of the city and the health of its inhabitants.

**Sec. 124**—**The City of Astoria is not bound by any contract or in any way liable thereon, unless the same is authorized by city ordinance and made in writing and by order of the common council signed by the Auditor and Police Judge or some person duly authorized on behalf of the City, but an ordinance may authorize any officer or agent of the City, naming him, to bind the City, without a contract in writing, for the payment of any sum of money not exceeding one hundred dollars.**”

After the charter was in force an ordinance was passed as follows:

“Sec. 1—That there be and hereby is organized a paid fire department of the City of Astoria, with powers and duties to be exercised by and through the committee on Fire and Water of the Common Council of said City.”

**Sec. 3.** The Committee on Fire and Water and their successors in office shall constitute and be ex-officio fire commissioners of the fire department of the City of Astoria.”

**Sec. 11.** The Committee on Fire and Water, the ex-officio fire commissioners, shall purchase all supplies for the fire department and order all necessary repairs **subject to the ordinances of the City of Astoria.**”

“**Sec. 15.** The Committee on Fire and Water, the ex-officio fire commissioners, shall report to the common council at least once in each month the expenditures of the department and other matter pertaining thereto, of public interest; and shall in the month of January of each year report in detail to the Common Council, the annual receipts and expenditures of the department, including a complete inventory of all property in their charge.”

These are all the provisions of the charter and the ordinances of the City affecting the question presented. **Sec. 38** confers upon the city council power to establish a fire department, to appoint persons as fire commissioners, to make and ordain rules for the gov-

ernment of the department and to procure all the necessary apparatus for the same. **Sec. 39** relates to the mode and manner in which this power shall be exercised. **Sec. 124** limits the city's liability.

Where the statute requires that an act of a municipality be done in the form of an ordinance, or if such requirement is implied by necessary or clear inference, the act can only be done by ordinance.

Nat. Bank vs Grenada, 44 F 262.

Holtz vs Sav. E. Co. 131 F 931.

City of Pensocala vs Tel. C. 49 Fla 161.

People vs M. 186 Ill. 560.

State ex rel. vs Comr. 165 Ind. 262.

Trenton vs Coyle, 107 Mo. 191.

Packard vs Ry. C. 48 N. J. Eq. 281.

Westport vs Masten 62 Mo. 647.

A resolution in such case would not suffice.

People vs M. 186 Ill. 560.

Wheeler vs Poplar Bluff, 149 Mo. 36.

Dalton vs Poplar Bluff, 137 Mo. 39.

Cape Gerardeau vs Forgan, 30 Mo. App. 556.

The charter is a grant of power, and the municipality possesses only those properties which the charter confers upon it, either expressly or incident to the execution of its powers.

City of Corvallis vs Carlile, 10 Or. 139.

Hawthorne vs E. Portland, 13 Or. 271.

Mutual Irrigation Co. vs Baker City, 58 Or. 315.

It is a familiar rule that when a mode of exercising a power is presented, that power can only be legally ex-

exercised in that mode.

*McManus vs Hornday*, 99 Iowa 507.

And where the charter authorizes a municipality to provide for a public improvement by ordinance, the municipality cannot provide therefor by resolution.

*Jones vs W.* 124, P. 312.

If disregarding the plain mandates of its Organic law, a city enters into a contract which it had no authority to, under the charter, the city is not bound.

*Jacob vs E.* 132 N. Y. S. 54.

All legislation by a City must be by ordinance, whether the City acts in its governmental capacity or in its private or business capacity; and an ordinance is necessary to create an indebtedness, whether arising in a governmental capacity or in a private or business capacity.

A resolution does not justify the incurring of an indebtedness against the city, though it be assumed that the city is acting in its private or business capacity.

*City of Louisville vs Parsons*, *supra*.

When there was no prior action or appropriation made for the purchase of a street cleaning machine, the action of a committee making a contract for the purchase of the same was declared invalid.

*Kindling Mch. Co. vs York City*, 54 Pa. Super Ct. 318.

In the transactions of all acts of a permanent nature involving a rule of conduct or permanently affecting the government and welfare of the city, the corporation

must, of necessity evidence its action by an ordinance adopted with all the formalities prescribed by the charter or by statute.

*Clafflin vs C.* 178 Ill. 549.

*Altamont vs Ry. Co.*, 184 Ill. 47.

*People vs M.*, 186 Ill. 560.

*McDowell vs People*, 204 Ill. 499.

*London Mills vs Wheeler*, 208 Ill. 289, *aff'g* 105 Ill. 166

Nor can a city make a contract for improvement, except in the manner specifically pointed out in the charter.

*N. P. L. Mftg. Co. vs E. Portland*, 14 Or. 3.

*N. P. Term. Co. vs. Portland*, 14 Or. 24.

*Allen vs Portland*, 35 Or. 420.

A resolution for the improvement of a street was insufficient.

*San Jose Impr. Co. vs Augeras*, 106 Cal. 498.

When the charter authorizes the passage of any ordinance necessary to carry into effect powers granted by a charter, it contemplates the passage of an ordinance whenever legislative action by such municipality establishes a permanent rule of conduct or is to have a continuing effect.

*Attamonte vs Ry. Co.* 184 Ill. 47.

The grades of streets can only be established by ordinance, a resolution for the purpose being insufficient.

*McDowell vs People*, *supra*.

If the requirements of an ordinance is implied by nec-



essary inference for a municipal act, a resolution would not answer.

People vs M. 186 Ill 506.

The Charter of Sellwood gave the council power to provide for the erection of a city jail, as the charter of Dallas provided for a fire department. The court passing upon this question (*Grafton vs Sherwood*, 24 Or. 118) said "Sec. 29 provides that the power and authority given by Sec. 28 can only be enforced and exercised by ordinance unless otherwise provided." The language of the charter in the present case is identical; and the court held, that no jail could be erected without an ordinance for that purpose. In the case of *Grafton vs Sellwood*, supra, an ordinance was passed, authorizing a contract, but did not take effect until after the contract had been entered into, yet the contract was declared void under the charter. Where a committee was authorized to contract for the erection of a school house at a cost not to exceed \$55,000. it was held that the committee had no authority to render the city liable for a larger sum.

*Turner vs Bridgeport*, 55 Conn 412.

In *McManus vs Hornday*, 99 Iowa 507, the grading of streets was included in the general power to pass ordinances to improve the comfort and convenience of the city.

In *Kipner vs Commonwealth*, 49 Pa. St. 124, the authority to direct the Mayor to sign certain coupon bonds in renewal of a loan was held, in effect, to require an ordinance. The courts of Pennsylvania strictly limit the province of resolutions to acts administration, and construe statutory grant of authority in such manner as

to limit the power of the council to acts by resolutions to acts of a temporary character.

(3) **The Charter prescribes the mode and manner of executing contracts, prescribes certain formalities of executing after proper authorization by Ordinance, and these formalities being mandatory, no contract is binding unless they are observed.**

It is settled law that a municipality can never become a debtor by implication, but only by virtue of an express contract, made by its authorized officers in the manner and form provided by law.

*Leletier Fiscal Court et al vs Spangerl*, 172 S. W. 498, see authorities therein cited.

Now what is the difference between an ordinance and a resolution. Why the distinction? An ordinance relates to questions or subjects of permanent or general character; whilst, a resolution relates to those which are temporary and restrictive in their operation and effect. The principal difference is in the mode of adoption. An ordinance must be enacted with all the formality required by the charter. While a resolution may be adapted with less formality and its legal effect determined less strictly, unless the charter otherwise provides.

*City of Alma vs Guarantee Sav. Bank*, 60 F. 203.

*City of Lincoln vs Sun Co.*, 50 F 756.

*City of Central vs Sears*, 2 Colo. 589.

Ordinances being about the most important and solemn acts of a municipal corporation, it is essential to their validity that they shall be adopted in the manner pre-

scribed by the charter. It may be laid down as a general rule, that all charter or statutory requirements as to the method in which an ordinance shall be introduced, and the manner in which it shall be considered, are, when reasonably calculated to induce deliberation, mandatory in their nature and must be complied with.

**When the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive and must be pursued, or the contract will not bind the corporation.** "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated."

Head vs Ins. Co. 2 Grand. 127; approved, Bank vs S, 12 Wheat, 64.

Butter vs C, 7 Gray (Mass) 12.

Bladen vs P, 60 Pa. St. 464.

McCracken vs City of San Fran. 16 Cal. 591.

Bermental vs San F. 21 Cal. 351.

Zottman vs San F. 20 Cal. 96.

Argenti vs San F. 16 Cal. 255.

Paris Tp. vs C. 80 Pa. St. 569.

When a committee was empowered to contract for the erection of a building at a price not to exceed a specified sum, they possessed no power to contract for a larger sum, and the person contracting with them were bound to take notice of the extent of their powers.

Turney vs Bridgeport, 55 Conn. 412.

Where the City Charter empowered the city council to pass all proper and necessary ordinances for the regulation and sale of city property, and prescribed the mode and manner of doing so a resolution did not comply with the requirements of the Charter. In *Cimpher vs City of Portland*, 121 Pac. 374, this rule was maintained, holding that "a resolution did not comply with any of the requirements of the charter. It did not purport to be an ordinance at all, nor was it in the form prescribed for ordinances. No ordinance providing for the sale of such property or fixing the terms thereof was ever passed. If it be conceded that the city had the power to grant or sell for what appears to have been private use, or dispose of it at all, it could do so only in the manner prescribed by its charter. As an attempted disposition of such land the resolution was a wide departure from the prescribed mode and was wholly ineffectual." Again in *Shepard vs City of Missoula*, 141 Pa. 544, the court said: "When the mode of exercising any power is pointed out in the statute granting it, the mode thus prescribed must be pursued in all substantial particulars. The statute having defined the measure of the power granted, and, also, the mode by which it is to be exercised, the validity of the action of the legislative body must be determined by an answer to the inquiry whether it has departed substantially from the mode prescribed. When the council does nothing but invite proposals and accepts bids, there is no compliance with the chartered provisions."

*Times Pub. Co. vs Weatherby*, 139 Cal. 618.

In the present case there was nothing but a simple

**motion** instructing the committee on Fire and Water to investigate and report the result of its investigation to the council. It will not be contended that this was a compliance with the provisions of the Charter. Considering the action of the Council in every possible light, it fails to show a substantial compliance with the provisions of the charter, although such provisions were mandatory.

This court said in *Beer vs Dallas City*, 16 Oregon 334, relied upon by the lower court in its interpretation of this very contract, that this section (Sec. 39) of the charter, was designed to apply to those cases, and only to those, where an ordinance was required by the charter; and its application ought to be so limited that the officers of the corporation could not exceed their authority as defined in the charter, nor fail to pursue the requirements of the statute under which they were acting.

The Judge aqus, alluding to a previous decision of this court, quoted as follows:

“I think that section was designed to apply to those cases, and only to those, when an ordinance is required by the charter, and when the work is expressly required to be let to the lowest responsible bidder, after notice, as in Sec. 86 of the charter.” Does not this principle apply in this case? Are not the charter provisions positive and mandatory? Is it not specifically provided in the charter that this work shall only be done under an ordinance of the Council? If an opposite view of this matter is taken by the Court, what becomes of Sec. 39? What force or effect can it have on the actions of this

council? Here is an express provision providing that the power and authority conferred by Sec. 38, can only be exercised or enforced by ordinance, and we are told that its provisions apply only to cases where "an ordinance is required by the charter, or where the work is expressly required to be let to the lowest bidder." **This is not a question of justice and good conscience, but one of pure legal rights. .Not whether the city ought to pay the stipulated price, but whether she is legally bound to pay. .As a question of equity, the appellee has other methods of redress but he cannot come into court and ask that that be declared right which the public policy of the state has declared to be wrong.** The City has as much right to consideration as the private individual; and when an individual deals with a corporation it is his duty to acquaint himself with all facts, and as to whether the party with whom he is dealing has the proper authority and power to act. He acts at his own peril and if the party with whom he deals is without authority in the premises, the loss is his own.

"One rendering service to a city pursuant to a resolution of the Council, may not recover from the city authorized to act only by ordinance; since persons, contracting with a city must at their peril, inquire into the power of the city or its officers to make contract."

City of Louisville vs Parsons, 150 S. W. (Ky) 498.

City of Corvallis vs Carlile, 10 Or. 139.

I W. T. 207

Ex parte R. 4 Ala. 259.

Daly vs San Francisco, 72 Cal. 154.

Elec. Co. vs Ft. Deposit, 50 So. 802.

Elec. Co. vs Chambridge, 103 Mass. 64.

Tarrion vs L. 92 Ill. 263.

Schamm vs S 24, N. J. Eq. 143.

But did not the council exceed its authority as defined in the charter; and did it not fail to follow the requirements of the statutes under which it had power to act? It will be admitted that a charter must be strictly construed. In the Beer case, *supra*, controlling the decision of the lower court, the power was held to be fully and plainly conferred and that there were no restrictions on its exercise. But does that apply here? **Sec. 38 of the Charter contains the general grant of power, but Sec. 39 declares that it can only be exercised in a certain manner.** It clearly was the intention of the legislature to control the exercise of this power to the extent that it could only be exercised by ordinance. To further emphasize this restriction, Sec. 124, reiterating its previous language, declares that it will not be bound by any contract, or in any manner made liable thereon, unless the same has been authorized by an ordinance; and proceeding, declares how the contract must be executed in order to render the city liable. The Section further goes on to state what particular contracts should unnecessarily follow this rule, thus placing the legislature intent beyond all cavil. The purpose of the framers of this statute could not have been more clearly or more forcibly expressed. In *Grafton vs Sellwood*, 24 Or. 118, it was held that powers granted could only be enforced by ordinance, and where the charter provided that a contract could only be entered into by ordinance, a contract ex-

executed one day before the ordinance authorizing it, went into effect, was void.

(4) **The Fire and Water Committee had no power to contract, and had no authority to sign a contract on behalf of the City.**

Finally it is contended on the part of appellant that the Fire and Water Committee had no authority to contract, and were not authorized to sign a contract on behalf of the City; and that a contract so executed was utterly void and unenforceable. The committee possessed no inherent powers, and whatever authority it might possess could only be received from the council, of which it was a subordinate branch. The charter provides by whom contracts may be signed. Sec. 124 provides that ordinances shall be "in writing and by order of the council signed by the Auditor and Police Judge, or some other person duly authorized on behalf of the City." Did the City Council of Astoria comply with this provision of the Charter? This contract was never signed by the Auditor and Police Judge, nor was any one else authorized by the Council by ordinance to act in behalf of the City. When a contract is directed to be executed and signed in a certain manner, and that order is not followed, the contract is invalid. In *Frick vs Los Angeles*, 115 Cal. 512, the Mayor was directed to sign the contract and failed to do so;—the section of the charter was held to be violated. In the present case the contract was signed by the Committee on Fire and Water. Where is the authority for the action of the Committee? The essential things to be done in executing this contract was



its preparation and its signing by the proper officials, authorized by ordinance, and its approval by the Council. Were any of these steps taken in the carrying out of this contract? The record fails to show it. Were the committee authorized to sign contracts? The council certainly had no power to authorize them to so sign, except by ordinance, and no such authority has been shown. In the case above quoted, a clerk was declared incompetent to sign a contract, because he was not a person authorized to sign contracts for the city, and there was no ordinance authorizing him to do so. In *Los Angeles Gas Co. vs. Toberman*, supra, it was said: "As the signature of a contract in writing is no part of the duties of a Mayor, authority to sign comes from the council."

When the charter authorizes the Mayor to sign contracts, then "some other person authorized thereto" should also be some person having similar or previous authority, and such provision necessarily means previously authorized thereto by some general law or by provisions of the charter; and that the council should first pass an ordinance conferring the authority and thereafter make the order directing him to sign.

*Los. Angeles Co. vs Toberman, supra.*

In the case of *Arnold vs City of Spokane*, 6 Wash. 442, it was held "that under the provisions of a city charter providing that the city is not bound by any contract unless authorized by an ordinance and in writing, and by order of the council, signed by the City Clerk or some other person authorized by the city, officers of the city cannot bind it by contract not in writing."

Equity will not declare a city bound by a contract not executed in accordance with the requirement of the Charter.

Frick vs Los Angeles, 115 Cal. 512.

The provisions of a city's charter that it shall not be bound or be liable on any contract, unless in writing by order of the Council, and signed by the Mayor, where there has been no compliance with this provision, there was no way to protect a party from the harsh consequences which followed his neglect to have the contract executed as required by the charter.

Times Pub. Co. vs Weatherby, 139 Cal. 618.

Considering therefore, the facts in this case, as shown by the record, and the law as herein set forth, appellant contends that:

**FIRST:** The power to make a contract of the nature set forth in the record is a legislative power and cannot be delegated.

**SECOND:** In the absence of express exception, this power can only be exercised by ordinance; and that the mode and manner of executing contracts, prescribed in the charter, is mandatory, and a failure to comply with its provisions renders a contract invalid and of no binding effect on the City; and

**THIRD:** When the charter provides by whom a contract shall be executed, no other person or persons have any authority to sign and execute a contract, unless the authority has been previously given by the council and that authority can only be given by ordinance.

If this method of making contracts is upheld, then upon principle, there is no reason why a Committee of the Common Council cannot bind it without any Ordinance, in an amount up to the limit of the city's indebtedness. It will play havoc with municipal affairs. The veto power given the Mayor, by the Charter of the City of Astoria, which is set forth in the Statement of the Case herein, will be held for naught. The plain charter provision which limits the power of the members of the Common Council to the method of contracting, particularly designated and set forth, will be abrogated in favor of the will of the Committee of the Council. It will readily resolve the governmental and legislative functions of the City of Astoria into a chaos. The Mayor of the City of Astoria has no vote under the Charter thereof, and will simply sit as a figure-head, presiding at the sessions of the Council, but will have no voice whatsoever, in its affairs. Five members of the Common Council of the City of Astoria can bankrupt the City by purchasing fire engines and fire equipment and supplies for its fire department, the other four members and the Mayor, and the people of the City of Astoria, will be absolutely powerless to prevent the ravages upon the City Treasury and the City funds.

We respectfully submit that when the Legislature of the State of Oregon enacted the Charter of the City of Astoria and set out Section 124 therein, wherein they specifically provided "the City of Astoria is not bound by any contract or in any way liable thereon, unless the same is authorized by City Ordinance and made in writing and by order of the Council, signed by the Auditor

and Police Judge, or some other person duly authorized on behalf of the City" that it meant just exactly what is plainly set forth in the language used. It can admit of but one construction, it means only one thing; it does not have a double meaning. This provision was afterwards re-enacted by the people of Astoria, under the initiative and referendum power given to the people by the Constitution of the State of Oregon. The will of the people and the will of the Mayor of the City of Astoria and the will of four councilmen would be set aside and be absolutely powerless against five members of the Common Council, if the decision of the lower court is sustained.

With these views and the authorities herein cited, appellant believes that the decisions of the lower court should be reversed, and the claim of appellee denied.

Respectfully submitted,

A. W. NORBLAD,

Attorney for the City of Astoria and attorney for  
plaintiff in error.

F. C. Hessee and J. T. Jeffries of counsel.

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I, A. W. Norblad, do hereby certify that I am the attorney for the Plaintiff in Error, the City of Astoria, in the within entitled cause, and that the foregoing is a true and correct copy of the brief in said matter on behalf of the said Plaintiff in error and of the whole thereof.

Dated this .....day of April, 1915.

.....  
Attorney for Plaintiff in Error

